1931, revoking a grant of Probate of the Will of Leong Thong deceased to Leong Kong Lam.

Leong Thong died on the 13th day of October, 1929. His Will was proved, and Probate was granted to Yek Yook Yin (f) and Leong Kong Lam on the 24th day of January, 1930.

Leong Kong Lam failed in business and went to China in or about the month of May, 1931. He left no address and did not communicate with any one in this country. Certain applications for mining leases had been made by the deceased in his lifetime. These could only be issued to the executor and executrix. The signatures of both were necessary, unless the grant to Leong Kong Lam was revoked. The executrix accordingly applied for a revocation of the grant to him, and an order was made on the 13th day of November, 1931, revoking the grant to Leong Kong Lam.

Leong Kong Lam has returned to the Federated Malay States, and now brings this motion to rescind the order revoking the grant. The executrix does not oppose the application.

Counsel for the applicant contended that there was power to rescind the order in a proper case, and cited *In re Staoles*, 3 Hagg. Ecc. 560; 162 E.R. 1263.

Apart from the peculiar circumstances of that case, the decision is that of an ecclesiastical Court. Whatever the jurisdiction of the ecclesiastical Courts may have been, the jurisdiction of the Court in the Federated Malay States in Probate matters is regulated by the Probate and Administration Enactment, 1920. There is no provision in that Enactment empowering the Court to rescind an order revoking a grant of Probate.

In my opinion the Court has no jurisdiction to make such an order. The motion was accordingly dismissed.

From the above Judgment the applicant appealed. The appeal was heard on the 29th November, 1932, before **THORNE, AG. C.J.**; **GERAHTY, J.**, and **MCFALL, J.**, and was dismissed.

[APPELLATE CRIMINAL JURISDICTION]

K. A. IBRAHIM .. .. .. Appellant

vs.

PUBLIC PROSECUTOR .. .. Respondent

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 81 of 1932]

Excise Enactment, 1932, Sections 27 (i), 67 and 68—Sale of Liquor on unlicensed premises.

A customer of a firm of grocers, carrying on business in premises not licensed for the sale of intoxicating liquors, ordered a bottle of whisky by telephone to be called for later. This firm procured from a firm of whisky importers a bottle of whisky, which was sent to the grocery firm, together with an invoice, by messenger. This invoice showed that the transaction was between the whisky importers and the grocery firm only.

On receipt of the bottle of whisky and the invoice, the manager of the grocery firm paid the messenger the price of the whisky in cash, and placed the bottle on the counter together with a debit note. This debit note showed that the customer had bought this bottle of whisky from the grocery firm.

Before the customer could call at the grocers, an Assistant Superintendent of Trade and Customs searched the shop and took possession of the bottle of whisky. Upon the hearing of a summons against the manager of the grocery firm for attempting to sell liquor without a licence, the Magistrate found that there had been a sale at the shop of the grocery firm by this firm to the customer, and convicted the defendant:—

Held, that there was evidence upon which the Magistrate might properly hold that the sale was at the shop, and that the conviction was right.

J. M. M. Lewis for the Appellant.

Raja Musa, Deputy Public Prosecutor, for the Respondent.

Cur. ad. vult.

3—11—1932.

THORNE, AG. C.J.—The appellant was convicted at the Magistrate's Court at Ipoh on the 12th September, 1932, on a charge:—

> "That you on or about the 16th August, 1932, at about 3.30 p.m. did attempt the sale of intoxicating liquor to wit one quart bottle of Johnnie Walker Red Label Whisky to one Mrs. E. K. Smith without a licence as required under Section 27 (*i*) of Enactment 12 of 1932 and thereby committed an offence under Section 68 of Enactment 12 of 1932 punishable under Section 67 of the same Enactment."

The appellant was also charged in the alternative with having in his possession for sale a bottle of whisky he not being duly licensed to sell intoxicationg liquors.

Upon the first charge the Magistrate imposed a fine of five dollars and ordered the destruction of the bottle of whisky and acquitted and discharged the appellant on the alternative charge.

From this conviction and sentence the appellant appealed.

The facts as proved may be stated succinctly as follows:—

On the 16th day of August, 1932, a Mrs. Elizabeth Kemp Smith telephoned to the Ipoh shop of a firm of grocers called M. S. Ally and Company, of which the appellant was then the manager, an order for one bottle of fresh plums and one bottle of Johnnie Walker Red Label Whisky for which she arranged to call later in the day.

M. S. Ally and Company, not being licensed for the retail sale of intoxicating liquors telephoned to the office of Messrs. Caldbeck, Macgregor and Company, the importers of this brand of whisky, for one bottle which was sent to their shop by a messenger who delivered it to them with the invoice Exhibit D which reads:

No. 1331.

IPOH, Order No.....

Date: 16th August, 1932.

Messrs. M. S. Ally & Co.,

Ipoh.

PLEASE RECEIVE
From Caldbeck, Macgregor & Co., Ltd.
Incorporated under the Companies Ordinances of Hongkong.
(Incorporated in Shanghai.)
1 bottle Johnnie Walker R/L qts.
Duty 1.59. Value 2.20.

The bottle of whisky is stated to have been placed upon the counter of the shop with a debit note or invoice, Exhibit B, which reads:

Phone 710. P. O. Box 7.
Bought of M. S. ALLY & CO.,
General Merchants.
103, Belfield Street,
IPOH. 16.7.1932.
Name; Mrs. E. K. Smith.....
Address.....
1. 1 lb. fresh plums .. .. .60
2. 1 bot. J. W. Red Whisky .. 3.80
$

Telephone Order

At about 3.30 p.m. the same day an Assistant Superintendent of Trade and Customs accompanied by an outdoor officer, and authorised by search warrant No: 1 of 1932, visited the premises of M. S. Ally and Company. A bottle of whisky was produced after some rather clumsy attempt at concealment on the part of one of the subordinates, and the appellant then stated that he was the manager of the shop. He produced the exhibits B and D and appears to have been quite ready to assist by furnishing any information asked for and to have volunteered the history of the transaction.

The Assistant Superintendent removed the bottle of whisky and some papers. Later the same day Mrs. Smith called at the shop of Messrs. Ally and Company and received from them a bottle of whisky. The evidence does not disclose whence Messrs. Ally and Company procured this bottle of whisky nor what happened to the bottle of plums.

Section 27 (*i*) of Enactment 12 of 1932 is as follows:—

> "No person shall sell by retail or offer for sale by retail any intoxicating liquor whether for consumption on the premises or off the premises of the vendor except under and in accordance with a licence issued under this Enactment and in a place in such licence specified; provided that nothing in this subsection contained shall apply to the sale by retail of bottled beer in opened bottles having their seals and capsules intact."

Section 68 of the same Enactment reads thus:—

> "Whosoever attempts to commit any offence punishable under this Enactment, or abets within the meaning of the Penal Code the commission of such offence, shall be punished with the punishment provided for such offence."

In the Court below and upon the hearing of this appeal before me there was a difference as to the true inference to be drawn from the facts. The appellant contended that he was an agent only for the purchase of the bottle of whisky and that when found in the shop of M. S. Ally and Company, that bottle was in transit from Messrs. Caldbeck Macgregor and Company to Mrs. Smith, that the transaction was a sale by Caldbeck Macgregor and Company to Mrs. Smith and that the appellant was an agent for purchase who had at no time any property in the bottle of whisky.

The respondent upon the other hand argued that the transaction was really a sale by Messrs. Caldbeck Macgregor to the appellant and by him to Mrs. Smith.

The learned Magistrate held that the latter was the true legal effect of the transaction.

I was referred by Counsel for the appellant to an article which appears in the Law Times Newspaper Volume 174 No. 4663 of the 13th August, 1932, at page 125, and (except for cases of *Jones* v. *Mighall* and *Nelson* v. *Mighall* decided by a Divisional Court on the 20th July last the report of which has not reached me yet), I have read all the cases there discussed, a list of which I append:—

Taylor v. *Oram*, (1862) 7 L.T. Rep. 68. *Stock* v. *Inglis*, (1882) 52 L.T. Rep. 825. *Pletts* v. *Campbell* (1895) 73 L.T. Rep. 344; (1895) 2 Q.B. 229. *Pletts* v. *Beattie*, (1896) 74 L.T. Rep. 148; (1896) 1 Q.B. 519. *Pasquier* v. *Neale*, (1902) 87 L.T. Rep. 230; (1902) 2 K.B. 287. *Titmus* v. *Littlewood*, (1916) 114 L.T. Rep. 614; (1916) 1 K.B. 732. *Healy* v. *Howlett and Sons*, (1917) 116 L.T. Rep. 591; (1917) 1 K.B. 337.

I have also referred to the following: *Elias and another* v. *Dunlop*, (1906) 1 K.B. 266.

It would appear from these cases that the word "sell" must be interpreted in the usual and ordinary meaning of the word, and that where a question arises as to the place of sale the deciding factor is the place at which the goods are appropriated to the sale, or in other words the stage in the transaction at which the property in the goods passed to the buyer.

It is necessary therefore to examine the evidence.

Mrs. Smith said "I gave M. S. Ally and Company an order.....I asked them to get and keep for me a bottle of whisky."

The appellant said "Exhibit A was bought for Mrs. Smith." He explained that he bought the bottle of whisky of Messrs. Caldbeck Macgregor and Company for $3.79, paid the messenger a tip of one cent and actually debited Mrs. Smith with $3.80 so that he made no profit upon the transaction which in this and many other instances was undertaken to oblige his customers.

The manager of Messrs. Caldbeck Macgregor and Company said:—

> "I supplied Johnnie Walker Whisky to people at the request of M. S. Ally and Company.....On 16th August, 1932, at 3.30 p.m. M. S. Ally and Company phoned up for a bottle of whisky."

In cross-examination he said "they phoned up that it was for Mrs. Smith.....The manager spoke in Malay asking me to send over a bottle of whisky. I asked him for whom it was. He replied that it was for Tuan Smith."

This witness was confronted with Exhibit D which he did not explain and the Magistrate appears not to have accepted his evidence as to his enquiry for whom the whisky was required and the answer that it was for Tuan Smith.

It is to be observed that the appellant does not mention this conversation; Exhibit D makes no mention of Mrs. Smith's name; and the transaction as between M. S. Ally and Company and Caldbeck Macgregor was for cash so that there would appear to have been no point in the enquiry. I think the Magistrate was right in not accepting this evidence.

Now as between Mrs. Smith and the appellant it is not suggested that she was interested as to how or where they procured the bottle of whisky she required so long as they provided a bottle. In my view this they did by purchasing one for cash from Messrs Caldbeck Macgregor and Company, which they in turn sold or proposed to sell to Mrs. Smith on credit in exactly the same manner as they sold to her on credit the bottle of plums.

This view is supported by Exhibit B which reads "Bought of." To illustrate this let us consider to whom the bottle of whisky belonged while in the possession of the appellant. Suppose that bottle had been broken by some mischance could the appellant have said to Mrs. Smith "we much regret that your bottle of whisky has been broken" and, if they had, would Mrs. Smith have paid for the broken bottle? I think not.

Again, what was the appellant's own view of the matter at that time? Exhibit B was prepared by him or under his instructions.

He there states that two items have been "bought of" M. S. Ally and Company by Mrs. Smith, and the price is debited to her. If Mrs. Smith bought then M. S. Ally and Company sold.

The price is debited and no distinction is drawn between the article which they admittedly sold from their stock and the bottle of whisky.

If the view of the appellant before the Assistant Superintendent called upon him was that he had bought the whisky as agent of Mrs. Smith one would have expected him to have debited her with this item as a disbursement.

If Messrs. Caldbeck Macgregor had regarded the transaction as a sale by them to Mrs. Smith, would not they have prepared an invoice addressed to Mrs. Smith c o M. S. Ally and Company or something of that sort?

Counsel for the appellant pointed to the fact that M. S. Ally and Company were not shown to have made any profit upon this transaction, and urged this as a cogent reason for holding that the transaction as between M. S. Ally and Company and Mrs. Smith was not a sale. This is fallacious. Traders doubtless expect to make profits upon the purchase and sale of goods, but I apprehend during this period of trade depression many traders have sold goods at a loss, and the transaction does not cease to be a sale because the seller fails to make profit.

A better test to be applied is this. Suppose the intervention of the Assistant Superintendent had not occurred and the goods had been delivered to Mrs. Smith and that later she had failed to pay M. S. Ally and Company at the end of the month and they had sued her to recover what form would the action have taken? I think it plain from Exhibit B that they would have sued for the price of goods sold and delivered.

I agree with the learned Magistrate in his view of the facts namely that the transaction was a cash sale of the bottle of whisky by Messrs. Caldbeck Macgregor to Messrs. M. S. Ally and Company, who then appropriated that bottle to Mrs. Smith's order and that the appellant intended to sell the bottle to Mrs. Smith and that the property in the bottle passed from Messrs. Caldbeck Macgregor to M. S. Ally, and had not passed to Mrs. Smith at the time of the visit of the Assistant Superintendent but would have passed to her upon the delivering of the bottle to her.

I agree therefore that the appellant was rightly convicted of an attempt to sell this bottle of whisky to Mrs. Smith.

There is one small matter which was not argued but which occurs to me.

The Magistrate ordered the destruction of the bottle of whisky and I think this was wrong. Under Section 67 of the Enactment his power is to order a forfeiture of any articles seized, and not their destruction.

This appeal will stand dismissed and subject to the slight variation of the order for dest uction to one of forfeiture the conviction a l sentence are affirmed.

Appeal dismissed.

JOHORE.

[APPELLATE CIVIL JURISDICTION]

K. A. R. S. T. ARUNASALAM CHETTIAR ..... **Plaintiff (Appellant)**

vs.

ABDUL RAHMAN BIN SULIEMAN and ANOR. ..... **Defendants**

and

TAN BAK CHAY..... **Objector (Respondent)**

[JOHORE CIVIL APPEAL No. 2 of 1931]

[BATU PAHAT CIVIL SUIT No. 76 of 1930]

Practice—jurisdiction—attachment of property—Objector's inquiry—Registrar's decision—Civil Procedure Code, Ss.2, 279, 284 and 614; Courts Enactment, Ss.7 and 73, discussed.

On an enquiry made on the summons of an objector to the attachment of property under S. 282 of the Johore